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Reports

RE AN ADVOCATE

[O.C.J. (Wylie C.J.) August 20, 1963]

[Kuching — Civil Case No. C/55 of 1963]

Advocates and Solicitors—Advocate on professional visit to branch office in Kuching—Taking active part in business of selling ladies wear—Importing advertising etc., allowing use of hotel bedroom for displaying goods —Whether conduct improper —Fused profession—Meaning of "if a barrister or solicitor in England"—Advocates Ordinance (Laws of Sarawak, 1958, Cap. 110), ss. 2, 4, 12(g) & 13.*

Interpretation—Literal meaning—Departure from—When justified.

The respondent, an advocate of Sarawak, is resident in Singapore, where he also practices as an advocate and solicitor. In November 1962 he visited Kuching in the course of carrying on his practice, and to favour a personal friend in Singapore, he imported with him ladies wear, arranged for advertisements and representatives, settled accounts with respect to them, attended to customs formalities in his own name and took the unsold goods back to Singapore. He had also allowed his hotel room to be used for displaying, selling and trying on the goods especially for the purposes of sale. Again in December the goods were brought to Kuching under the same circumstances and this time they were left with a trading company for sale on commission.

The present proceedings were instituted by the Attorney-General to have the respondent struck off the roll of advocates or suspended from practice for infringing section 12(g) of the Advocates Ordinance (Cap. 110) which reads:

"Any advocate may be suspended from practising in Sarawak, or his name may be struck off the roll of advocates..... by order of a Judge for any of the following causes —

(g) if he does any act which, if done in England, would render him liable to be disbarred or struck off the roll of the court, or suspended from practice, if a barrister or solicitor in England."

Held: (1) the words "if a barrister or solicitor in England" have no reference to the original qualifications of an advocate. To give them a literal interpretation would impose different standards of professional conduct on advocates, a result repugnant to the other provisions of the Ordinance and which defeat their purpose;

(2) whatever the precise meaning of section 12(g), the conduct of the respondent in these transactions was improper conduct such as would justify action in England to disbar a barrister or suspend him from practice or to strike off a solicitor or suspend him from practice and therefore fell within the ambit of the paragraph;

(3) as the respondent had not been given any opportunity to comply with any demand to discontinue his engagement in the business and as he had undertaken not to repeat this conduct, neither of the penalties to which he had rendered himself liable, should be imposed on him.

Quare: The more restricted standard expected of a barrister in England is not expected of a member of a completely fused profession.

* This paragraph corresponds to [S] Advocates & Solicitors Ordinance (Cap. 188), s.25(2)(i) & [F] Advocates & Solicitors Ordinance, 1947, s.26(2)(h).

APPLICATION to suspend or strike an advocate off the roll of Advocates.

P. E. H Pike, Q.C., Attorney-General (*H. S. Daniel,* Crown Counsel with him) for the applicant.

G. S. Hill for the respondent.

Cur. Adv. Vult.

Wylie C.J.: The respondent is an advocate on the roll of advocates for Sarawak. He resides in Singapore, where he also practises as an advocate and solicitor under the Advocates and Solicitors Ordinance of Singapore, being a member of a partnership firm there. That partnership also has an office in Kuching, with an advocate in charge, and the respondent visits Sarawak from time to time for the purpose of carrying on the practice there. On 10th April last, the Attorney General applied *ex parte* for a rule to issue against respondent to shew cause why he should not be struck off the roll of advocates or suspended from practice. That application was made pursuant to section 13 of the Advocates Ordinance (Cap. 110) and was supported by an affidavit which, accepting its contents are *prima facie* evidence, disclosed that respondent had done acts which might render an advocate liable to be struck off the roll, or suspended from practice, pursuant to section 12(g) of the Ordinance.

Accordingly, a rule issued against the respondent and the proceedings came into open court on 4th June last when, upon the respondent objecting to the procedure which the Attorney-General proposed to adopt, there was an adjournment to enable the parties to file affidavits. It was not possible to arrange a fixture suitable to all concerned until 9th August.

There is virtually no dispute about the facts in issue and they may be set out as follows. On 19th November, 1962, the respondent arrived in Kuching from Singapore in the course of carrying on his practice in Kuching. He imported with him cartons containing women's dresses and brassieres on which he paid duty in his own name. The declared value of the goods was $1,309.85 and respondent paid $196.48 as duty. He went to the office of the *Sarawak Tribune* and arranged for an advertisement to appear on 20th, 21st and 22nd November reading as follows:—

"NOTICE

Fabulous range of Swiss and American dresses, Hawaiian Muu Muus and 'Hickory' Bras from Vanity, Singapore, on view Aurora Hotel, Room 207. Representative Wanted."

Room 207 was respondent's bedroom at the Aurora Hotel where he stayed while he was in Kuching.

Evidence was given on affidavit by four ladies that, in consequence of the advertisement, they went to room 207 and, in some cases, dresses were bought. Also, in some cases, dresses were tried on in the bathroom attached to the bedroom. Except for a short time on one occasion, these affidavits show that a lady, who (it is now common ground) is the wife of the advocate in charge of the Kuching office of respondent's firm, was present on all these occasions and was mainly engaged in displaying and selling the ladies wear. Also, on nearly all the occasions these deponents describe, the respondent was also in the bedroom and took part on some occasions in the discussions concerning purchases, although a reasonable view of this evidence would be that the wife of the other advocate took the principal part in displaying and selling the dresses. Three out of the four deponents tried on dresses in the bathroom while respondent was in the bedroom.

During this time, respondent went to the Chung Nan Trading Company in Khoo Hun Yeang Street and discussed with the proprietress, Mrs. Chai, a proposal to bring dresses and brassieres on his next visit to Kuching in December and leave them at this shop to be sold by Mrs. Chai on commission for a Singapore shop called "Vanity". This witness was cross-examined as to whether respondent definitely said he was bringing these goods in December or whether he said he may be bringing them. The point does not seem to be very material, but the witness, in re-examination, said definitely that she expected respondent to be bringing dresses in November and I find that that was the impression respondent's language conveyed to Mrs.Chai.

On 5th December, respondent came to Kuching and imported dresses and brassieres valued at $912.70, paying $136.91 duty. He delivered these goods to Mrs. Chai and again inserted an advertisement in the Tribune reading as follows:—

"Cocktail dresses and 'Hickory' bras from Vanity, Singapore, just arrived at Chung Nan Trading Company, 12 Khoo Hun Yeang Street."

Mrs. Chai sold some of the articles and accounted to respondent for the money she collected, less her commission. She handed the unsold goods back to respondent.

Mrs. Chai also said that she first met respondent in September or October, 1962, and a day or two later he came to her shop with a sewing machine catalogue and asked whether she would sell these machines for a friend of his in Singapore. She said she would and wrote to the suppliers, whose address respondent had given her, but she could not arrange satisfactory terms with "the Singapore company".

The respondent, in his affidavits, confirmed most of the foregoing evidence. He said that he was not trading on his own account, but that he was doing a favour for a personal friend in Singapore who was the proprietress of "Vanity", a shop dealing in ladies wear in Singapore. This friend had suggested that, as he was visiting Kuching only a short while before Christmas, he might be willing to take some goods there and arrange for an agent to sell for "Vanity" on commission. All that he did, was done in pursuance of this suggestion to oblige his friend. He arranged on the November occasion for the wife of the advocate in Kuching to sell these goods on commission from his bedroom and she stayed in the room during the day for this purpose while he was engaged in his practice in the town. After office hours, he would return to his room and he would be present then on occasions when customers called, but the wife of the advocate still did the selling, although he joined in the discussion on occasions. This lady accounted to him for the money she had received for sales, less a commission he had arranged with her.

On the December occasion, the goods were brought under the same circumstances at the request of his friend, and he took them to Mrs. Chai to sell on commission at a rate arranged between Mrs. Chai and himself, following discussions he had with her in November.

He confirmed Mrs. Chai's evidence about the proposal to sell sewing machines and said he brought a machine from Singapore to show Mrs. Chai. This was also done at the request of the same friend who is a director of the company which sells the sewing machines.

The wife of the advocate in Kuching and the proprietress of "Vanity" swore affidavits which confirmed the respondent's account of his part, and their respective parts, in these transactions. At the conclusion of the hearing, it was common ground that respondent had done these acts under the circumstances he had described.

It follows that respondent was taking an active part in the business of selling ladies wear by bringing these goods over, arranging advertisements and representatives, settling accounts with them, attending to customs formalities in his own name and taking the goods back to Singapore, but, of course, especially in allowing his hotel bedroom and bathroom to be used for displaying, selling and trying on the goods that were in his room expressly for the purposes of sale.

The question for decision is whether this conduct falls within section 12(g) of the Advocates Ordinance, the relevant part of which reads as follows:—

"Any advocate may be suspended from practising in Sarawak, or his name may be struck off the roll of

advocates....by order of a Judge for any of the following causes —

.....

(g) if he does any act which, if done in England, would render him liable to be disbarred or struck off the roll of the court, or suspended from practice, if a barrister or solicitor in England."

Much time was spent by counsel in submissions and argument as to the meaning of this paragraph. I do not think I am unfair to either the Attorney-General or counsel for the respondent if I say that, while they submitted what might be possible interpretations, they were not prepared to make a firm submission as to what the real meaning of this paragraph is. And even a brief consideration of the problem will indicate that their caution is fully justified.

Set out as above, divorced from the rest of the Ordinance and from what is known to be the practice in countries where the two branches of the profession are fused, the language used seems clearly to mean that an advocate is liable to be struck off the roll, or suspended from practice, if he does any act which, if done in England, would render him liable to be disbarred or suspended from practice, if he was a barrister in England, or to be struck off the roll, or suspended from practice, if he was a solicitor in England. This would apply to any advocate, whatever his original qualification on which he was admitted as an advocate.

It is to be noted that persons may be so admitted who are neither barristers called to the bar in England nor solicitors admitted as such in England. It would therefore be absurd to resort to the forced interpretation hinted at in the course of argument that the words "if a barrister or solicitor in England" refer to the advocate's original qualifications, because in that case some advocates would not be affected by this paragraph at all and there would thus be different standards of professional conduct imposed, according to an advocate's original qualifications. Moreover, there would also be two different standards for those admitted to practice on an English qualification according to whether that qualification was that of a barrister in England or that of a solicitor in England. For the two branches are subject to different rules regulating the conduct of their members. There would then be at least three different standards in Sarawak, according to the original qualification. It would thus lead to absurd (and, I am satisfied, unintended) consequences to resort to what I consider to be a forced view of these concluding words of the paragraph.

However, before accepting what I have referred to as the clear meaning of the paragraph taken on its own, it is essential to consider the rest of the Ordinance and it may also be relevant to bear in mind what the actual practice is in countries where there is fusion.

A glance at the rest of the Ordinance is sufficient to dispel any idea that what I have stated to be the clear meaning of this provision taken on its own, can be the meaning intended by the legislature. For a barrister in England is liable to the penalties referred to, if he practises as a solicitor, and a solicitor in England is liable to the corresponding penalties, if he practises as a barrister. Thus, no advocate could practice simultaneously as a barrister and as a solicitor, if the language used is given its literal meaning. But "practice in Sarawak" is defined in section 2 of the Ordinance as meaning to perform in Sarawak —

"(a) any of the functions which in England may be performed by a member of the Bar as such; or

(b) any of the functions which in England may be performed by a Solicitor of the Supreme Court of Judicature as such."

Notwithstanding the use of the word "or", it is clear from the rest of the Ordinance that the latter provides for a fused profession. No distinction is made as to the form of practice except in one instance which makes it clear that fusion is intended. Section 4, after giving to advocates the exclusive right to "practise in Sarawak", sets out in paragraph (b) of the proviso that no advocate of the rank of Queen's Counsel shall perform any of the functions of a solicitor in England which may not be performed by a barrister, but is not to be precluded from continuing in partnership with an advocate who does perform any of those functions.

Fusion having been provided for, it is clear that a literal interpretation of paragraph (g) cannot have been intended. The difficulties created by these provisions of the Ordinance might be met by the view that this paragraph must be read subject to the other express provisions of the Ordinance. Those provisions establish, *inter alia,* that an advocate is authorised to do all that a barrister may do in the course of his practice as such in England and all that a solicitor may do in the course of his practice as such in England. Consequently, any acts so authorised would, on this interpretation, be impliedly excluded from paragraph (g).

This paragraph would then mean that an advocate is liable to be suspended from practice or struck off the roll, if he does any of the acts described, unless it is an act authorised by another provision of the Ordinance. Although this is a departure from the meaning of the language used in a case where, taken on its own, the meaning of the provision is clear, I am satisfied, notwithstanding the judicial warnings of recent years about relying on absurd results to justify departing from the language of a statute, that this is a case where the literal meaning would produce a result repugnant to the other provisions of the Ordinance and defeat their purpose, including one of the principal purposes

of the Ordinance. Consequently, this departure from the literal meaning is justified.

This view would lead to the result that, in matters not otherwise provided for in the Ordinance, an advocate must not depart from the standard required of a barrister in England or from that required of a solicitor in England. There is, so far as I am aware, no insuperable difficulty in requiring that dual standard. Its effect would be that an advocate could not do acts prohibited to members of either branch in England (unless they were expressly or impliedly authorised by the Ordinance) and, where there were two different standards, such as in the case of accepting directorships of companies, the more restricted standard would have to be observed.

Problems do arise, however, when one is aware of the actual practice in countries where the two branches are fused, even in countries where this provision is actually in force. Actual experience, either in private practice, or as a law officer, or in a judicial capacity, in more than half a dozen countries where there is fusion, shows that, in none of these countries, is this standard of conduct expected. While there seems no general rule, it can be said that the more restricted standard expected of a barrister in England is not expected of a member of a completely fused profession, and this is the practice even in some countries which have the provision set out in paragraph (g).

However, no actual instance could be found where this provision had been the subject of judicial interpretation. While a judicial decision might have assisted in arriving at an acceptable interpretation that differed from what seems to me, after paying regard to the other provisions of the Ordinance, to be the meaning of this provision, practice, or even custom cannot vary the provisions of statute law.

It is with a sense of relief, therefore, that I am able to record that both the Attorney-General and counsel for the respondent were in agreement that the conduct of the respondent in these transactions was improper conduct such as would justify action in England to disbar a barrister or suspend him from practice or to strike off a solicitor or suspend him from practice. The view that this conduct would justify such action in the case of a solicitor in England was supported by the opinion of the Council of the Law Society. This opinion had been obtained on the instructions of the respondent and was recorded, and filed in these proceedings, in an affidavit sworn by Sir Thomas Lund, the secretary to the Law Society.

Paragraphs 4, 5 and 6 of that affidavit read as follows:—

"4. Rule 1 of the Solicitors' Practice Rules, 1936 made under section 1 of the Solicitors' Act, 1933 provides as follows:—

'A solicitor shall not directly or indirectly apply for or seek instructions for professional business or do or permit in the carrying on of his practice any act or thing which can reasonably be regarded as touting or advertising or as calculated to attract business unfairly.'

Having regard to the terms of this Rule, the Council of The Law Society have laid it down to be professionally improper for a practising solicitor to engage in a business which, while honourable in itself, is calculated to attract business unfairly to the solicitor — for example, an estate agency business.

5. On the facts before them which are common to the affidavits filed by the applicant and the respondent respectively the Council of The Law Society are of opinion that it would be professionally improper for a practising solicitor in England to have undertaken such business as did the respondent on two grounds:— First, that it is inconsistent with the character and nature of the business which a solicitor carries on or ought to carry on for a practising solicitor to engage in the business of, or be employed or engaged in effect as, a commercial traveller or sales representative whether on his own account or on behalf of some other person for the purpose of soliciting custom; and second, that in inviting the public by advertisement to attend at his room where he was from time to time personally present a practising solicitor would infringe Rule 1 of the Solicitors' Practice Rules, 1936 aforesaid.

6. If the facts in this case had been brought to the attention of the Council of The Law Society as affecting a solicitor practising in England, they would have required the solicitor forthwith to discontinue his engagement in this business and if he declined to do so, they would institute proceedings before the Disciplinary Committee constituted under Section 46 of the Solicitors' Act, 1957."

It is, of course, necessary for this court to form its own decision on this question. Irrespective of the opinion of the Council of the Law Society, to which in any case I would naturally pay the greatest respect, I have no hesitation in arriving at the conclusion (for the same reasons as are set out in the paragraphs quoted) that the respondent, in behaving as he did, did acts which, if done in England, would render him liable to be struck off the roll of the court, or to be suspended from practice, if he was a solicitor in England. The principle enshrined in Rule 1 of the Solicitors' Practice Rules, 1936, is equally applicable to a barrister and so is the other ground referred to in the affidavit. For the same reasons, therefore, it is obvious that, if he was a barrister in England, he would equally have been liable to be disbarred, or suspended from practice. In neither case is this conclusion affected by the fact that there is no evidence that respondent was acting as he did for personal gain.

Consequently, it is not necessary for me to pronounce upon the precise meaning of paragraph (g), for whatever its limitations may be, conduct which would render both a barrister and a solicitor liable to these penalties, must still fall within those limitations.

I find therefore that the respondent, in acting as he did, was guilty of conduct which was professionally improper and fell within section 12 (g).

The respondent relied on paragraph 6 of Sir Thomas Lund's affidavit. In his evidence from the witness box, respondent said that it had never entered his head that what he was doing, amounted to conduct which was professionally improper and that he would certainly not have done it, had he realised this. He knew that police inquiries had been made concerning these transactions (the Attorney-General explained that questions arising under the Trades Licensing Ordinance had been investigated.) but the first he knew of possible disciplinary proceedings was when the rule *nisi* was served on him. He had thus had no previous opportunity of complying with any such requirement as is referred to in paragraph 6 of Sir Thomas Lund's affidavit. Through his counsel, he undertook not to act in this manner again and expressed his willingness to enter into such an undertaking in writing, if so required. Having regard to the action which Sir Thomas Lund has stated that the Law Society would take in similar circumstances, I do not consider that this is a case in which either of the penalties to which the respondent has rendered himself liable, should be imposed. I have recorded in this judgment that the respondent, through his counsel, has undertaken not to repeat this conduct and I consider that, in all the circumstances of the present case, this will suffice.

If this application had taken its normal course, I should have also made an order against the respondent for costs, but the parties have previously agreed that the respondent would not claim costs for the abortive hearing on 4th June last, if the Attorney-General did not claim his costs in connection with the remainder of the application. Having regard to the course these proceedings have taken, I consider this a reasonable arrangement in regard to costs. Therefore, I make no order as to costs.

Paragraph (g) of section 12 is in force in all the territories which propose to join Malaysia. It does seem advisable that, after Malaysia is established, the appropriate authorities, including the professional organisations, should consider whether paragraph (g) should be amended. If it has the meaning suggested in this judgment, it is possible that some members of the legal profession in these territories are not complying with the law controlling their profession. In any case, it is highly unsatisfactory that there should be so large a measure of doubt as to the meaning of the Ordinance in regard to one of the most important subjects with which it has to deal.

Order accordingly.

Solicitors: *Battenberg & Talma*

GOH CHOOI LEONG v. PUBLIC LIFE ASSURANCE CO. LTD.

[O.C.J. (Gill J.) September 14, 1963]
[K.L. — Civil Suit No. 153 of 1962]

Insurance—Non-disclosure of material fact—Avoidance of liability.

Contract—Insurance—When voidable.

The defendants in consideration of premiums paid and to be paid by the assured, one LCH since deceased, on a policy issued by them on May 6, 1960, agreed to insure his life in the sum of $10,000 and upon proof of his death to pay the said sum to his executors, administrators or assigns. The assured died on May 29, 1960 and the plaintiff, to whom the policy was assigned, by letter notified the defendants of the death of the assured on June 2 and forwarded to them the death certificate. In this action the plaintiff sought to recover the sum payable on the policy which the defendants failed to pay.

The defendants' case was that the contract was voidable and that they were not liable because the declaration by the assured on the faith of which the policy was issued contained false statements, misrepresentations and concealment and suppression of the truth. There was medical evidence that the assured had been treated for pulmonary tuberculosis and was warded in a Tuberculosis Ward in the Klang District Hospital from November 1958 to March 1959. However in his declaration when applying for the insurance in answer to the question, "Have you ever had advice about your heart or lung or for cough?" he said "No".

Held: (1) in view of the fact that the assured had not long before the date of the declaration been in Klang Hospital for treatment for pulmonary tuberculosis, his answer in the declaration was a deliberate lie;

(2) the contract of insurance was therefore voidable.

Case referred to:—

(1) *Rozanes* v. *Bowen* (1928) 32 Ll.L.R. 98, 102.

ACTION.

Khoo Eng Chin for the plaintiff.

N. A. Marjoribanks for the defendants.

Cur. Adv. Vult.

Gill J.: The defendants, by a policy of Insurance No. 7088 dated the 6th day of May, 1960 issued by them to one Lim Choo Hock (hereinafter called "the assured") in consideration of premiums paid and to be paid by the assured upon the terms mentioned in the policy, agreed to insure the life of the assured in the sum of ten thousand dollars and upon proof of his death to pay the said sum to his executors, administrators or assigns.

The assured, by a conditional assignment in writing dated the 26th day of May, 1960, assigned the said policy to the plaintiff. A copy of the said assignment was filed in the head office of the defendant company as specified in the policy on the 28th day of May, 1960.

The assured died on the 29th day of May, 1960 while the policy was in force. The plaintiff by letter dated 2nd June, 1960 duly notified the defendants of the death of the assured and forwarded to them a certificate relating to such death on the 9th day of June, 1960. The present